IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1493

GLADSTONE REALTORS®, ET AL.,
Petitioners,

vs.

VILLAGE OF BELLWOOD, ET AL.,
Respondents.

ROBERT A. HINTZE, REALTORS®, ET AL.,
Petitioners,

vs.

VILLAGE OF BELLWOOD, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

WILLIAM D. NORTH
200 East Randolph Drive
Chicago, Illinois 60601
Attorney for the National Association of Realtors®

KIRKLAND AND ELLIS,
Of Counsel.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

TABLE OF AUTHORITIES.

Cases.

Statutes.

Other Authorities.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1493

GLADSTONE REALTORS®, ET AL.,
Petitioners,

vs.

VILLAGE OF BELLWOOD, ET AL.,
Respondents.

ROBERT A. HINTZE, REALTORS®, ET AL.,
Petitioners,

vs.

VILLAGE OF BELLWOOD, ET AL.,
Respondents.

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONERS

INTEREST OF THE NATIONAL ASSOCIATION OF REALTORS®

1. **Preliminary.** The interest of NAR in this cause is direct, vital and immediate.

The Court of Appeals has held that persons having no intention of buying, renting, or selling a home nevertheless have

standing to sue a real estate broker or salesperson under Section 3612 of the Fair Housing Act of 1968 § 42 U. S. C. § 3612, for conduct which they allege "deprives them of the social and professional benefits of living in an integrated society." *Village of Bellwood* v. *Gladstone REALTORS®*, 562 F. 2d 1013, 1020 (7th Cir. 1978).

This decision of the Court of Appeals involves the interests of NAR for the following reasons:

First, the decision will fundamentally affect the nature of the relationship between the real estate brokers and salespersons and their clients and customers;

Second, the decision will vitally affect the nature and type of real estate services which will be made available and the manner in which those services will be performed; and

Third, the decision will determine the extent to which real estate brokers and salespersons will be subjected to lawsuits generated by lawyers and legal service organizations.

2. **The Identity of NAR.** The interest of NAR in the decision in this cause can best be understood if NAR is identified.

Founded in 1908, NAR is headquartered in Chicago, Illinois. It is a non-profit professional association of persons engaged in all phases of the real estate business, including, particularly, brokerage, appraising, management, and counseling.

NAR is the owner of various registered service and collective membership marks, including the mark "REALTORS®". Over the years NAR has promoted a public understanding of the term "REALTOR®" as identifying a member of the NATIONAL ASSOCIATION OF REALTORS® engaged in the real estate business on a professional basis and subscribing to and bound by a strict Code of Ethics.

NAR has been successful in promoting this understanding and, as a consequence, it is the beneficiary of "good will" which is recognized as extremely valuable by the public and a large number of real estate practitioners.

Because of the value of the term "REALTOR®" and also because of the many and varied services available from NAR, real estate boards have sought affiliation with NAR as Member Boards of REALTORS®. Such affiliation is accomplished by the issuance of a charter by NAR according membership privileges and granting the Board the right to use the term "REALTOR®" in a specified geographic area in exchange for the Board's agreement to service their members and the public, to enforce the Code of Ethics, and to assist in safeguarding the registered marks of NAR.

Today, the membership of NAR includes 50 State Associations of REALTORS®, over 1700 Member Boards of REALTORS®, and approximately 600,000 REALTORS® and REALTOR-ASSOCIATE®s.

NAR was created to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to promote professional competence. In pursuit of these objectives, NAR is concerned with a wide range of activities—real estate education, home protection, arbitration of member and public controversies, equal opportunity in housing, real estate licensing, public service, neighborhood revitalization, and legislation relating to the real estate business.

3. **The interest of NAR in Fair Housing.** The Code of Ethics of NAR, to which all members are required to subscribe, provides in Article 10:

> The REALTOR® shall not deny equal professional services to any person for reasons of race, creed, sex, or country of national origin. The REALTOR® shall not be a party to any plan or agreement to discriminate against a person or persons on the basis of race, creed, sex, or country of national origin.

This article was adopted by NAR in support of the letter and spirit of the Federal Fair Housing Act of 1968 as well as the Civil Rights Act of 1866 as applied by this Court in *Jones* v. *Mayer Co.*, 392 U. S. 409 (1968).

In further recognition of its legal and moral obligation to support fair and equal housing opportunity, NAR has established a Code for Equal Opportunity which has been adopted and implemented by all of its Member Boards and has created, in collaboration with the Department of Housing and Urban Development, the first nationwide Affirmative Marketing Agreement in the real estate industry. Presently, over 250,000 REALTORS® and REALTOR-ASSOCIATES® have subscribed to this Agreement and over 14,000 additional subscribers are being processed each month.

Consistent with its total commitment to fair and equal housing opportunity, NAR has initiated a nationwide neighborhood revitalization program to limit urban blight and has coupled this program with a broad range of activities to generate or encourage new sources of home financing for low and moderate income families.

No other organization in the real estate industry has committed more of its time and human and material resources to the goals of the Federal Fair Housing Laws than has NAR.

PURPOSE OF THIS BRIEF AMICUS CURIAE.

The purpose of NAR in submitting this brief is to present the views of the chief representative of the organized real estate profession as to the effects of the Court of Appeals decision in this cause if allowed by this Court to stand.

This brief appears appropriate in view of the fact that nowhere in the decision of the Court of Appeals does it appear that the slightest attention was given to the impact or effects of the decision on the real estate brokerage business and those engaged in it.

Yet in its laudable desire to discourage discrimination in housing, the Court below has created an instrument of legal harassment and oppression unprecedented in American jurisprudence. In its legitimate concern for the interests of the home-

seeker, the Court has countenanced a concept of standing which cannot help but incite litigation, coerce unwarranted settlements, discourage legitimate business activity, and reward perjury.

We do not propose herein to duplicate the statement of facts and legal arguments so ably presented in Petitioner's Brief. Rather, we would support and adopt such statement and arguments as our own.

We would, however, preface our Argument by highlighting several facts concerning Plaintiffs' activities as "testers" and the relationship of such activities to this action. While the Court below attempted to distinguish between Plaintiffs as "testers" and Plaintiffs as persons allegedly "denied the right to live in an integrated society," as shown below its effort falls far short of the mark.

The reason Plaintiffs are before this Court is solely because of their experience as testers. This experience is so central to their status as Plaintiffs that any determination of their standing cannot ignore it. The limitations inherent in the testing experience are the limitations which should disqualify Plaintiffs' claim of standing here.

The testing experience is premised on pretense. The tester's identity as a homebuyer is fictitious, his housing needs are unreal, and his responses are wholly contrived.

The testing experience is lawyer manipulated. Thus, the testing program is organized by an attorney or a group of attorneys offering legal services through an organization such as the Leadership Council For Metropolitan Open Communities. Such attorneys train and direct the testers, evaluate their reports, and determine how such reports shall be used.

The testing experience involves an inherent bias. Testers are usually unpaid and hence are motivated to act as testers by a "special interest" in civil rights problems and a conviction that the targets of the testing are the cause of such problems. Testers, unlike investigators for law enforcement agencies, have no obli-

gation of fairness or balance. On the contrary, testers are free to construe even innocent conduct as evidence of guilt.*

Because of these qualities, the product of the testing experience is extremely unreliable. Where, as is the usual case, the only use made of the testing experience is to alert law enforcement agencies to suspected discrimination, the dangers posed by this unreliability can be mitigated by the independent investigation and verification procedures employed by such agencies.

Where, as here, the testing experience becomes the vehicle for the generation of a lawsuit seeking over $300,000 in damages and broad injunctive relief, its unreliability and inherent susceptibility to use as a means of gaining publicity, legal fees, clients, and coerced settlements must be considered in evaluating whether the interests of the tester turned Plaintiff represent the type of "personal stake in the outcome of the controversy," *Flast* v. *Cohen*, 392 U. S. 83, 99 (1967), which justifies standing.

As the ensuing argument will demonstrate, the metamorphosis of testers into Plaintiffs does not make reality out of pretense, or produce "injury in fact" from a real estate transaction that "never was."

ARGUMENT.

I. **Introduction.** The outcome of this case turns on whether or not this Court intended by its decision in *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U. S. 205 (1972) to grant

* Illustrating that even non-discriminatory conduct is vulnerable to misinterpretation by biased testers is the report of tester Lonnie M. Randolph concerning his meeting with Beverly Ricchiuto in which, after finding no cause for objection in the manner in which he was treated, added a postscript to his report as follows:

"P.S. I think they knew I was coming.
—Had Equal Opportunity sign up.
—very friendly
—Favortism [sic] toward Bellwood."

Appendix, page 59.

standing to sue under Section 3612 of the Fair Housing Act, 42 U. S. C. Section 3601, *et. seq.*, to any person prepared to allege a violation of such Act.

This is the construction placed upon this Court's *Trafficante* decision by the Court below. By adopting this construction, the Court below was able to find that Plaintiffs had standing to bring this suit notwithstanding the fact that

> (a) Plaintiffs were admittedly *not* bona fide homebuyers nor authorized law enforcement agents or investigators;
>
> (b) Plaintiffs were enlisted to bring this suit by a legal service organization whose lawyers represent Plaintiffs here on a contingent fee basis and which is seeking to recover alleged damages in excess of $300,000.00 in these cases in addition to awards of attorneys' fees and costs; and
>
> (c) Plaintiffs were admittedly *not* deprived of access to available housing of their choice or of neighborhoods of their choice or of communities of their choice. Appendix, p. 111.

The Court below has concluded that this Court's *Trafficante* decision has constituted every citizen a "private attorney general" under the Fair Housing Act, *Bellwood*, 569 F. 2d at 1019 and authorized him to sue any person, firm, corporation or organization whom he believes is engaged in conduct which denies anyone anywhere the "benefits of living in an integrated society."

The NATIONAL ASSOCIATION OF REALTORS® does not believe this Court intended its *Trafficante* decision to be so broadly construed. Such a construction is not only contrary to the express language and rationale of the *Trafficante* decision, but is also contrary to the statutory design of the Fair Housing Act and inconsistent with this Court's established principles governing standing.

II. **The Trafficante decision of this Court does not warrant or require the construction adopted by the Court of Appeals.**

There are three reasons why the decision of the Court of Appeals below is inconsistent with and contrary to this Court's decision in the *Trafficante* case.

First, while this Court was willing to extend standing beyond the persons seeking occupancy in a housing unit, such extension of standing was specifically restricted to those persons "in the *same housing unit* who are injured by racial discrimination . . ." *Trafficante*, 409 U. S. at 212. *Emphasis Supplied.* That this extension of "standing" was intended to be limited to those persons occupying the same housing unit is confirmed by the concurring opinion of Justices White, Blackmun and Powell. Those Justices agreed, with some misgiving, to sustain standing provided such standing was limited to those ". . . in the position of petitioners in this case," *Id.*, that is, occupants of the same housing unit.

It is one thing to extend standing to persons occupying the same housing unit, operated by the same management, utilizing common facilities, and having essentially the same address. It is quite another to extend standing, as the Court below has done, to any person from anywhere who chooses to charge a violation of the Fair Housing Act in respect of a residential real estate transaction.

In the *Trafficante* case the number of persons to whom standing to sue was extended was both ascertainable and limited by the number of persons occupying the housing unit. Here the number of persons who would have standing under the decision of the Court below is both unascertainable and unlimited. Thus, if standing derives from the denial of "benefits of living in an integrated society," then standing would necessarily be extended to all members of society—beyond the occupants of the housing unit, beyond the neighborhood, beyond the city, village or community, beyond the state to every citizen in every jurisdiction in which the Fair Housing Act is law.

Standing which is extended to every person merely by reason of his being a member of society destroys utterly the meaning and purpose of the standing doctrine.

Second, the *Trafficante* decision does not compel or require the decision of the Court below because of the nature of the injury asserted and the relationship of the defendant to that injury.

In *Trafficante* the alleged injury involved the denial of the opportunity to live in an integrated housing unit. To the extent this injury could have occurred as a result of discriminatory conduct, only one person could be held responsible—the defendant landlord and its management agents. Likewise, the defendant had it within its power to cure the injury and correct the conditions giving rise to it.

Here the *Trafficante* relationship between the alleged injury and the defendant cannot possibly exist. Thus, to the extent Plaintiffs have been denied the opportunity to live in an integrated society, defendant cannot be held solely, primarily or even remotely responsible. If our society is not integrated, it is not because an agent of Defendant failed in the game of "let's pretend" he played with Plaintiffs. It is the fault of everyone who created and countenanced the enforcement of racially restrictive covenants for all the years prior to 1948 and this Court's decision in *Shelly* v. *Kraemer*, 334 U. S. 1 (1948). It is the fault of the late discovery that the "separate but equal" doctrine which governed the operation of the public schools until *Brown* v. *Board of Education*, 347 U. S. 483 (1954) also encouraged and reinforced segregated housing patterns. It is the fault of the Federal Housing Administration which until the late 1940's administered its mortgage insurance programs on the basis of a policy that

> ". . . it is necessary that properties shall continue to be occupied by the same social and racial classes." Under-

writing Manual, U. S. Federal Housing Administration, Part II, Section 233 [November 1, 1936].

It is the fault of the Congress which waited until 1968 before enacting the Fair Housing Act and even the fault of this Court which failed to perceive the mandate of the Civil Rights Act of 1866 until 1968. *Jones* v. *Mayer Co.*, 392 U. S. 409 (1968). And ultimately it is a fault which must be shared by every homebuyer and seller and real estate practitioner who has ever permitted prejudice to become a consideration in his or her housing decisions.

To predicate Plaintiff's standing to sue one or two real estate agents out of more than one million licensees engaged in business because of their failure to respond adequately to hypothetical questions posed by theoretical homebuyers in an artificial transaction and to do so on the premise that this is necessary to defend the opportunity to live in an integrated society makes the concept of standing a travesty. Yet this is precisely the predicate upon which the Court below has premised its decision.

Third, the *Trafficante* decision does not compel or require the decision of the Court below because of the relationship of the Plaintiffs to the Defendant.

In *Trafficante* the Plaintiffs had a *bona fide* contractual relationship with the Defendant landlord. They were its tenants. In this capacity, they paid rent to purchase the services of Defendant landlord's agents and had reason to expect and require that the management services they purchased, in common with other tenants, would be rendered in accordance with the law.

Moreover, to the extent the alleged discriminatory practices of the Defendant landlord determined who would occupy the housing unit, the Defendant landlord was effectively determining who would be the Plaintiff's immediate neighbors and hence, in at least one sense, the Defendant's alleged discrimination could have directly affected the Plaintiff.

No similar relationship exists here between the Plaintiffs and Defendants. The Plaintiffs were not, by their own admission, *bona fide* clients or even potential clients of Defendants. While they freely exploited Defendants' time, resources, experience and organization, they neither offered nor paid them compensation. They established no fiduciary or contractual relationship nor any course of dealing.

The Plaintiffs against whom Defendant allegedly discriminated were not neighbors of the other Plaintiffs and did not desire or propose to become neighbors. On the record, Plaintiffs were no more affected by the responses they received from Defendants than any other resident of the United States.

This was not the case in *Trafficante*.

III. The statutory design of the Fair Housing Act would be defeated by the decision of the Court below.

The purpose of the Fair Housing Act is to promote equal opportunity to buy, sell, rent and occupy housing regardless of race, creed or national origin. 42 U. S. C. § 3601. Recognizing that fair housing involves not merely practices and procedures, but also public attitudes, and realizing that free housing choice requires the involvement of all branches and of all levels of government, and aware that the distinction between some forms of illegal discrimination and responsible conduct can be difficult to establish, Congress adopted a statutory design providing a range of statutory rights and remedies carefully calculated to achieve the purpose of the Act.

Thus, having clearly identified certain enumerated practices and procedures as inconsistent with fair housing objectives, the Congress provided in Section 3612 for those injured by such practices to have the option of either proceeding directly to court or utilizing the conciliation procedures authorized under Section 3610.

Congress, however, also realized that there might be other practices and procedures which it could not precisely define which nevertheless might adversely affect the attainment of fair housing objectives. In an effort to reach such activities without, at the same time, inhibiting legitimate real estate transactions, the Congress provided in Section 3610 that alleged discriminatory housing practices, other than those specified in Sections 3603, 3604, 3605, and 3606, and enforceable under Section 3612 must be made the subject of an administrative proceeding before the Secretary of the Department of Housing and Urban Development.

The manifest purpose of such proceeding was to afford the Secretary the opportunity to examine the practices alleged to be discriminatory, to apply the expertise and resources of the Department to such examination, and to ascertain, in the first instance, whether or not the practice involved constituted a substantive threat to fair housing.

A collateral but equally important purpose of the administrative procedure mandated by Section 3610 was to assure the involvement of state and local law enforcement officials in the correction of practices perceived as inconsistent with equal housing opportunity. To implement this latter purpose, Congress required that the Secretary of the Department of Housing and Urban Development offer state or local officials the first opportunity to correct offending practices and defer further action, except in rare cases, if such opportunity were accepted.

Completing its statutory design in support of Fair Housing, Section 3609 contemplates the establishment of programs of voluntary compliance by members of the housing industry in consultation with the Secretary of Housing and Urban Development.

The Fair Housing Act thus sought a balance between the coercion of litigation under Section 3612, the accommodation of conciliation under Section 3610, and voluntary affirmative action under Section 3609.

The issue of standing before this Court is central to the preservation of this balance.

Recognition of Plaintiff's standing to sue in this case would effectively nullify all incentive to employ the conciliation process in regard to complaints concerning practices which might be thought to adversely affect fair housing, but which have not been specifically identified in Sections 3603 through 3606 to permit suit under Section 3612. By destroying this incentive to conciliate, this Court would frustrate the Congressional goal of causing such complaints to be reviewed by the agency of the Federal government charged with the duty of administering the Fair Housing Act and possessing the greatest expertise in the proper interpretation of the Act.

The essential evil of affording direct access to the courts to those who have suffered no direct injury is that it encourages the bringing of ill-founded or specious lawsuits which could not withstand the scrutiny of the Secretary's fair housing experts.

While the Secretary's refusal to seek a resolution of a complaint does not foreclose the complainant from a range of alternative remedies, such refusal does tend to clarify the vulnerability of the defendant and hence limit his susceptibility to an unwarranted settlement coerced by the prospect of protracted litigation and uncertain outcome.

Similarly, if Section 3610 is nullified by this Court, the affirmative action objectives of Section 3609 will also suffer. The interrelationship between the Secretary's conciliation function and its administration of voluntary compliance programs is direct and intimate. The problems and issues observed by the Secretary in individual conciliation proceedings have historically been translated into voluntary compliance programs designed to prevent such problems and issues from arising in the future. At the same time, voluntary compliance programs have not only expedited and strengthened conciliation activities by providing information concerning their existence and utilization, but also have led to the development of supplemental conciliation arrange-

ments designed to prevent the further escalation of controversies into judicial confrontations.*

The Congress in adopting the Fair Housing Act recognized, full well, that they were undertaking to change attitudes of public behavior engrained for hundreds of years. They also recognized that the powers created to effect this change were so great as to cause serious injury if abused.

This is why the Congress arranged the powers it created so as to encourage conciliation and affirmative action rather than litigation.

This Court should respect the arrangement of powers contemplated by Congress. The decision of the Court of Appeals for the Ninth Circuit in *Topic* v. *Circle Realty*, 532 F. 2d 1273 (9th Cir., 1976) is particularly instructive in this regard. The impatience of the Bellwood Court with what it deems to be the "toothless nature" of the conciliation procedure contemplated by Section 3610, *Bellwood*, 569 F. 2d at 1020, does not justify the usurpation or dilution of the civil rights enforcement powers of the Secretary. Should Plaintiffs conclude that the civil rights authorities cannot do the job assigned them by Congress, their remedy is the ballot box rather than a request to this Court to "take over."

IV. The necessary nexus for standing does not exist between the status asserted by Plaintiffs and their claim.

This Court has held that it is both appropriate and necessary to inquire ". . . into the nexus between the status asserted by the litigant and the claim he presents . . ." *Flast* v. *Cohen*, 392 U. S. 83, 102 (1967). The purpose of such inquiry is to determine whether or not the Plaintiff satisfies the "injury in fact" test established by this Court.

* Under the Affirmative Marketing Agreement between HUD and the NATIONAL ASSOCIATION OF REALTORS®, provision is made for the establishment of Community Housing Resources Boards to develop solutions to fair housing problems encountered.

The claim asserted by Plaintiffs here is clear; they assert that Defendants' conduct has denied them the social and professional benefits of living in an integrated society. The status in which they assert this claim is likewise clear—it is as citizens having an interest in living in an integrated society.

Plaintiffs do not assert that they have been denied equal housing opportunity or foreclosed from living where they desire to live. Nor could they since they have admitted that they were not *bona fide* homebuyers. *Appendix* III.

Nor do Plaintiffs assert their status derives from their employment as "testers," although all of the allegations of the complaint were admittedly developed through such employment. Nor could they assert such status since the Court below expressly refused to recognize that "testers *qua* testers have a cause of action." *Bellwood*, 569 F. 2d at 1016.

Assuming, *arguendo*, that the right to live in an integrated society is a "cognizable interest," there is no "nexus" between the purpose of the Fair Housing Act which is to guarantee equal access to housing opportunities and a class of litigants who may have an interest in an "integrated society" since a guarantee of such "opportunities" is not a guarantee of such a "society." Thus, under the *Flast* analysis, it is clear that these plaintiffs lack standing to sue under the Act.

Further, if Plaintiffs' status is nothing more than that of a citizen having an interest in living in an integrated society, then their claim of standing must additionally fail on the authority of this Court's decision in *Sierra Club* v. *Morton*, 405 U. S. 727 (1972). That decision, rendered just months before the *Trafficante* decision of this Court upon which the Court below based its opinion, is particularly relevant and, we submit, should be controlling here.

In the *Sierra Club* case, the Court held that the Sierra Club had no standing to sue the United States Department of Interior and private developers in order to vindicate their members' "special interest" in preserving certain lands as wilderness areas.

In denying standing to the Sierra Club, this Court noted that ". . . 'the injury in fact test' requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured. . . ." *Id.* at 735. The Court found that a "mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' . . ." so as to warrant standing to sue. *Id.* at 739.

The Court went on to say that:

> ". . . if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization, however small or short lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. *Id.* at 739-740.

While this Court recognized in the *Sierra Club* case that "aesthetic and environmental well being, like economic well being," were cognizable interests ". . . deserving of legal protection through the judicial process," *Id.* at 734, it denied standing to the Club because it failed to demonstrate the existence of "injury in fact."

Similarly here, while this Court may recognize that an interest in "the social and professional benefits of living in an integrated society" are cognizable interests deserving of legal protection through the judicial process, Plaintiffs' demand for standing must nonetheless fail because they are not among those "injured in fact." The alleged conduct of Defendants was induced by a testing program designed not for the purpose of actually exercising rights protected by the Fair Housing Act, but rather as an experiment to determine whether such rights might be exercised in hypothetical situations.

Aside from the fact that this Court has traditionally denied standing when the case the Plaintiff seeks to bring is of a "hypothetical or abstract character . . ." *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240 (1937), the results of an experiment can never constitute the "injury in fact" required to justify standing.

Nor can this Court's *Sierra Club* decision be distinguished on the theory that the Sierra Club was asserting injury to an "organizational interest" whereas Plaintiffs here assert injury to a "personal interest." This Court disposed of that theory by its recognition that ". . . an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club,* 405 U. S. at 739. It is not "interest" but "injury" which is critical.

But if, as the Court below suggests, the injury Plaintiffs allege results from the general denial of the "benefits of living in an integrated society," it would follow that Plaintiffs can claim no greatr injury than any other member of Society. Thus, if such injury is to be recognized as a basis of standing, then every member of society would have standing equal to Plaintiffs to initiate suit for the same alleged conduct of Defendants about which Plaintiffs complain.

Clearly, the extension of standing to everyone in society merely on the basis of their interest in living in an integrated society would impose impossible burdens on the judicial system and expose real estate practitioners to intolerable harassment. It would fail "to assure that concrete adverseness which shapes the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr,* 369 U. S. 186, 204 (1962). It would fail its purpose ". . . to put the decision as to whether review will be sought in the hands of those who have a direct stake at the outcome." *Sierra Club,* 405 U. S. at 740. It would invite and incite self-generated injury designed specifically to produce a lawsuit.

Moreover, the extension of standing to everyone in society, as required implicitly by the decision of the Court below would create a class of litigation substantially incapable of administration or settlement. Thus, if the injury sued upon results from the general denial of the "benefits of living in an integrated society" it would follow that unless the Plaintiff sues on behalf of "all members of society," a decision or settlement involving the Plaintiff would not foreclose any other person "in society" from bringing suit for damages, if not for injunctive relief, for the same alleged offense. At the same time, the usual requirement that notice of a settlement be given to all members of a class would make the cost of the settlement of a class action on behalf of all members of society prohibitive.

CONCLUSION.

The Fair Housing Act aims to provide, within constitutional limitations, for fair housing throughout the United States. 42 U. S. C. § 3601. It does not propose to establish an integrated society or to guarantee any person's right to live in such society. The Act prohibits practices and conduct which deny equal housing opportunity and choice, but nowhere does the Act seek to control how the freedom of housing choice it guarantees will be exercised.

The Act does not mandate quotas but choice; it does not require the assimilation of different groups into one homogenous whole but rather requires the incorporation of individuals of different groups into society *as equals*.

Standing to sue under the Fair Housing Act should be determined not in terms of a claim of right Congress has not created and the Constitution has not guaranteed. Nor should it be determined on the basis of a case or controversy arising from a theoretical transaction.

For these reasons, Amicus respectfully submits that this Honorable Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

WILLIAM D. NORTH
200 East Randolph Drive
Chicago, Illinois 60601
Attorney for the National Association of Realtors®

KIRKLAND AND ELLIS,
Of Counsel.